that the mark 'Ustikon' was incapable of distinguishing Mr. Davis' soles. And this being so, and the other conditions of registration in Part B. having been satisfied, the registration was in order and the mark cannot now be taken off. But the case seems to me very near the line. And I hope — perhaps against hope — that the result of this decision will not be to choke the B. Register with horribly misspelt words, which were originally intended to bear and still to some extent suggest a more or less obvious reference to the ordinary characteristics of the goods they denote."

In the mark under consideration here there is no circumstance present to detract from the descriptive character of the mark.

I would also like to refer to the *"BBI Litetrac" Trade Mark case.*(6) An application was made to register the trade mark "BBI Litetrac" in respect of installations for lighting, lighting fittings and lamps all included in Class II. The letters "BBI" were non-distinctive and the word "Litetrac" is a mis-spelling of, and the phonetic equivalent of the words "light track". In dismissing the appeal against the refusal to register the mark it was held the presence of the non-distinctive letters "BBI" did not lessen the aptness for normal description of the word "Litetrac" as to render the mark applied for capable of registration.

For these reasons I find that the Registrar correctly refused this application for registration in Part B of the Register too.

In the circumstances this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Rodyk & Davidson.*

MALAYSIAN REPORTS

HARLEY v. ONONG BINTI AH HING

[A.C.J. (Seah J. (President), Datuk Haji Abdul Wahid Wee, Resident and Matimbon bin Majangkin, District Chief) September 26, 1974]

[Kota Kinabalu — Native Court of Appeal No. 1 of 1973]

Native Customary Law — Appellant not a native — Case brought in Native Court against the appellant — No sanction of District Officer — Native Courts Ordinance (Sabah Cap. 86), s. 5(1)(b).

Practice and Procedure — Sanction to institute legal proceedings — Native Courts Ordinance (Sabah Cap. 86), s. 5(1)(b).

In this case the Native Court at Papar had purported to make an order on an application by the respondent against the appellant, her husband, for the division of pencarian property. The order was affirmed by the District Officer. The appellant appealed against the order on the ground that he was not a native and the sanction of the District Officer was not obtained as required under section 5(1)(b) of the Native Courts Ordinance (Cap. 86).

Held: when legal proceedings were instituted against the appellant in this case, no sanction had been obtained from the District Officer, Papar, and therefore the proceedings in the Native Court were null and void and its decision must be set aside.

Cases referred to:-

(1) *Gokulchand Dwarkadas Morarka* v. *The King* A.I.R. 1948 P.C. 82.

(2) *Public Prosecutor* v. *Oie Hee Koi & Associated Appeals* [1968] 1 M.L.J. 148 at p. 154.

(3) *Yek Tieng Sing & Ors.* v. *Public Prosecutor* [1971] 2 M.L.J. 94.

(4) *Thorpe* v. *Priestnall* [1897] 1 Q.B. 159.

NATIVE COURT OF APPEAL.

Seah J., President (delivering the judgment of the Court): This is an appeal by the appellant from a decision of the Papar Native Court given on January 30, 1973 whereby the Native Court purported to make an order that the "pencharian", namely the money in the bank, the house at Kimanis and the land at Mile 8 (presumably at Papar) be divided into two shares to be shared between the appellant (husband) and the respondent (wife) and that in the future, both the appellant and the respondent may be at liberty to arrange the distribution of the "pencharian" among their children. An appeal against the decision of the Papar Native Court was brought before the District Officer at Papar and the District Officer having been satisfied with the said judgment dismissed the appeal on May 5, 1973. The appellant is dissatisfied with both decisions and has lodged an appeal to the Native Court of Appeal on the following grounds, namely:

(1) since only one party is a native (that is my wife) the sanction of the District Officer is required under section 5(1)(b) of the Native Courts Ordinance (Cap. 86) and such sanction does not appear to have been obtained to enable the Native Court to have jurisdiction in this case.

(2) there was no breach on my part of native law or native custom, religious, matrimonial or sexual for the case to go before the Native Court. There was no evidence that I was deserting my wife. On the contrary, my wife had agreed to migrate and settle in Australia together with our children

and I had made application to the Australian Authorities for that purpose on behalf of all of us. It was only latterly that she changed her mind and refused to come with us to Australia. As a husband I am entitled to expect that my wife would come to live with me. I still wish my wife to come and live with me.

(3) as I informed the Native Court I had sold the house in Papar for the sum of $45,000 and that money had been remitted to Australia.

(4) under section 5 of the Guardianship of Infants Ordinance (Cap. 54) I am responsible for the maintenance, welfare and education of my children and my children have agreed to come with me to Australia.

(5) I have every intention to continue to assume my responsibilities and my duties to my wife and children.

The facts may be briefly stated.

The respondent addressed a complaint to the District Chief of Papar which was undated and the contents read as follows:

"I come to report to you because my husband has sold out our house with the intention of going back to Australia next year with my family.

Recently, I went to Kota Kinabalu to see my daughter who is working there because I heard rumours that she always goes out late into the night with a boy. For that reason she despises me and the father is also siding her which means that he also despises me.

Therefore, I would like to ask for consideration so that our properties (pencharian) would be shared according to native law as I am not going to Australia. Because there is proof that both my husband and my daughter have despised me and it will be worst for me if I follow them to Australia.

The properties (pencharian) are as follows:
one house in Papar,
money in bank and
one house in Kimanis."

Following the receipt of this complaint, the Ketua Mahkamah Anak Negeri of Papar issued a Surat Summons Mesti Datang Bichara to Orang Kena Dawa, B. M. Harley and fixed the hearing of the case on December 19, 1972 at 9 a.m. The appellant applied for the trial to be rescheduled to January 2, 1973. On January 6, 1973, the appellant again applied for the case to be postponed to January 16, 1973. On January 29, 1973, the magistrate at Papar issued a Warrant of Arrest addressed to the Police Officer at Papar directing him to arrest the said B. M. Harley and to produce him before the Native Court at Papar on January 30, 1973 at 9 a.m. as B. M. Harley stand charged with the offence of "mungkir hadzir bichara". From the record of proceedings, it seems plain that the appellant and the respondent appeared before the Papar Native Court on January 30, 1973. In dismissing his appeal on May 5, 1973, the District Officer, Papar says:

"B.M. Harley, the appellant erred by stating that sanction of the District Officer have not been obtained by the Native Court to have jurisdiction in this case. He failed to note that the warrant of arrest was in fact signed by the District Officer on January 29, 1973. Thus by signing the warrant of arrest in this case clearly indicate that the undersigned has given his sanction for the Native Court to try the case.

As I have scrutinized the papers herein and am satisfied that the judgment given by the Native Court is fair, I hereby dismiss the appeal."

Now section 5(1)(b) of the Native Courts Ordinance (Cap. 86) reads:

"5(1) Every Native Court shall exercise jurisdiction to the extent set forth in and subject to the provisions of this Ordinance:

(b) in cases arising from the breach of native law or custom, religious, matrimonial or sexual, if the sanction of the District Officer has been obtained to the institution of proceedings, where one party is a native;"

In *Gokulchand Dwarkadas Morarka* v. *The King*[1] the Privy Council had to decide the sufficiency of a sanction to prosecute under the Cotton, Cloth and Yarn (Control) Order, 1943. Section 23 of the Order provides that no prosecution for the contravention of any of the provisions of the said Order shall be instituted without the previous sanction of the Provincial Government or any such officer of the Provincial Government not below the rank of district magistrate as the Provincial Government may by general or special order in writing authorise on his behalf. The relevant part of the sanction to prosecute reads:

"Resolution: Government is pleased to accord sanction under clause 23, Cotton, Cloth and Yarn (Control) Order, 1943, to the prosecution of Mr. Gokulchand Dwarkadas Morarka for breach of the provisions of clause 18(2) of the said Order.

By Order of the Governor of Bombay,
(Signed)
Deputy Secretary to Government, Bombay.

To: The District Magistrate, Sholapur."

At page 84, Sir John Beaumont who delivered the judgment of the Privy Council said:

"In their Lordships' view, in order to comply with the provisions of clause 23, it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential, since clause 23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority. The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seem to have thought, concerned merely to see that the evidence discloses a *prima facie* case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution as inexpedient.

Looked at as a matter of substance, it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case. Nor, in their Lordships' view, is a sanction given without reference to the facts constituting the offence a compliance with the actual terms of clause 23. Under that clause sanction has to be given to a prosecution for the contravention of any of the provisions of the Order. A person could not be charged merely with the breach of a particular provision of the Order; he must be charged with the commission of certain acts which constitute a breach, and it is to that prosecution — that is, for having done acts which constitute a breach of the Order — that the sanction is required. In the present case there is nothing on the face of the sanction and no extraneous evidence, to show that the sanctioning authority knew the facts alleged to constitute a breach of the Order, and the sanction is invalid."

In the *Morarka's* case the Privy Council was dealing with the question whether the sanction was adequate. However, dealing with the argument that under section 80 of the Internal Security Act 1960, the consent of the Public Prosecutor to the prosecution should have been and was not obtained, Lord Hodson in

delivering the leading judgment of the Privy Council in the case of *Public Prosecutor* v. *Oie Hee Koi & Associated Appeals*[2] said at page 154:

"It was further argued that under section 80 of the Act the consent of the Public Prosecutor should have been and was not obtained. The answer to this objection is that the Public Prosecutor was himself the prosecutor and his consent is implicit in his action. The provision in section 80 requiring consent is applicable where prosecutions take place, *e.g.* before a Sessions Court and the Public Prosecutor is not the actual prosecutor."

In *Yek Tieng Sing & Ors.* v. *Public Prosecutor*[3] at page 96 Azmi L.P. in giving the judgment of the Federal Court said:

"We appreciate this important difference that in the Indian case the sanctioning authority was the Government whilst in this instant case the certifying authority is the Director of Public Prosecutions who must be presumed to have gone into the facts of the case before he issued the certificate. Notwithstanding that we are of the opinion that the certificate for the purpose of regulation 4 (of the Emergency (Criminal Trials) Regulations 1964 as confirmed by section 6 of the Emergency (Essential Powers) Ordinance No. 1 of 1969) must state the offence and such particulars as to the time and place of the alleged offence as are reasonably sufficient to give notice of the matter in question."

In *Thorpe* v. *Priestnall*[4] the headnote reads:

"By the Sunday Observance Prosecution Act 1871, 'No prosecution... shall be instituted... for any offence... under' the Sunday Observance Act 1676 ... 'except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed...'."

The appellant was convicted under the Sunday Observance Act. The chief constable gave a verbal consent before the information was laid, and gave consent in writing after the information was laid and the summons issued:

"Held that the prosecution was instituted when the information was laid and therefore was not instituted with the consent in writing of the chief constable, and the conviction was bad."

Applying this principle to the facts of this appeal, it seems to us that the legal proceedings in the Native Court at Papar were instituted when the Ketua Mahkamah Anak Negeri issued the Surat Summons Mesti Datang Bichara to the appellant dated December 15, 1972 fixing the hearing of the case on December 19, 1972.

On this date, it is quite plain that no sanction, oral or otherwise, had been obtained from the District Officer at Papar. True, the Warrant of Arrest was signed by Encik Abdul Majid Chong on January 29, 1973 but with respect, he did so in his official capacity as a magistrate and not as a District Officer of Papar (see section 11(2) of the Native Courts Ordinance (Cap. 86)). Moreover, the signing of the Warrant of Arrest was apparently made after the institution of the legal proceedings in the Native Court.

On the other hand, the provision of section 5(1)(b) of the Native Courts Ordinance (Cap. 86) would appear to provide that the sanction of the District Officer must be obtained prior to the institution of the legal proceedings in the Native Court. In other words, the sanction would appear to constitute a condition precedent to the institution of legal proceedings in the Native Court.

According to *Morarka's* case, it seems to us that in order to constitute a valid sanction, all the relevant facts constituting the subject of the complaint must be placed before the sanctioning authority if the facts constituting the complaint are not shown on the face of the sanction. Needless to say the sanctioning authority must consider and weigh the facts carefully before giving the sanction. Alternatively, the sanctioning authority knew the facts alleged which constituted a breach of native law or custom pertaining to religious, matrimonial or sexual matters before authorizing the sanction. Here there is no evidence that either of these conditions has been complied with. For these reasons, we are constrained to hold that no sanction or valid sanction was given or had been obtained from the District Officer at Papar prior to the institution of the legal proceedings in the Papar Native Court on January 30, 1973.

In the opinion of this court, the exposition of the law relating to section 80 of the Internal Security Act, 1960 by Lord Hodson in delivering the majority judgment of the Privy Council in the case of *Public Prosecutor* v. *Oie Hee Koi & Associated Appeals, supra* has no application to the facts of this case.

Since the grant of a valid sanction of the District Officer is a condition precedent to the institution of legal proceedings in the Native Court under section 5(1)(b) of the Native Courts Ordinance (Cap. 86) where one party to the proceedings is not a native within the meaning of the Interpretation (Definition of Native) Ordinance (Cap. 64) and the provision of subsection (4) of section 5 of the Native Courts Ordinance, we rule that having regard to our finding, the proceedings in the Papar Native Court dated January 30, 1973 are null and void. Under the circumstances, we have no alternative but to set aside the purported decision of the said court.

Order accordingly.